

the intention to legislate, then it is without question *ultra vires*.

Of these rules, rule 29 provides as follows:—

"The circumstances of a person being named as an executor in the will..... or being interested as a legatee.....under such will.....renders him or her incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the will.....the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible, unless he or she shall first release his or her interest thereunder."

In my opinion there is no power by rule to say what persons or classes of persons are capable of being witnesses or to impose conditions of any kind upon them. It is by no means clear that the Enactments of the Federated Malay States require any witness at all; they certainly do not impose any such conditions as are contained in this rule. If under a rule it was permissible to impose any such conditions, then what limit would there be to such conditions? It would be easy to state all sorts of conditions which might be imposed. I will only suggest one, viz. that no relative of the testator should be qualified to be an attesting witness.

Such matters are not, in my opinion within the province of the rule making authority but of the legislature. My attention has not been drawn to any Enactment and I have not been able to find any, containing clauses similar to those in the English Wills Act, which I have set out above, or in the Indian Succession Act sections 50 and 54. Needless to say that I should welcome an Enactment dealing with these matters so as to remove a state of affairs which, in my opinion, is at present unsatisfactory.

I come to the conclusion that rule 29 is *ultra vires* so far as it relates to the admissibility of the evidence of an attesting witness, who is a legatee or imposes any condition on such attesting witness. I purposely refrain from making any comments on these rules except to the extent that it is absolutely necessary for the determination of the principal question now before me.

It only remains for me to say that the answers to the questions raised by the Public Trustee are

- (1) the bequest to W. German is valid;
- (2) the attestation by W. German does not affect the validity of the will.

The costs of the Public Trustee and of Mr. W. German will come out of the estate. The attendance of any other parties at this stage would appear to be unnecessary, and therefore, they will have to pay their own costs.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C.J.

July 7, 1934.

ANG CHOON KOAY (AS TRUSTEE).....
Appellant.
CHAIRMAN SANITARY BOARD,
KUALA LUMPUR.....Respondent.

[SELANGOR APPLICATION FOR EXECUTION

No. 76 of 1933]

The Sanitary Boards Enactment, 1929, sections 45 and 50 — Priority of statutory charges thereunder over charges under The Land Code, 1926, Part X.

A rate is protected by a first charge on the land itself and in the last recourse it should be recovered by a sale of the land.

The words "subject to the provisions of the Land Code, 1926," in section 45 of the Sanitary Boards Enactment, 1929, do not make that first charge subject to any other charges created under Part X of the Land Code.

Summons in Chambers before Thomas, C. J.

E. A. S. Wagner for the appellant.

R. C. Cussen, Deputy Legal Adviser, for the respondent.

Cur. Ad. Vult.

THOMAS, C. J.—This is an appeal from the decision of the Registrar of the Supreme Court, Kuala Lumpur, ordering certain lands, the property of the appellant as trustee for a minor, to be sold free from the charge thereon.

The appellant is the chargor or the representative of the chargor in respect of a voluntary charge effected under the provisions of Part X of the Land Code. No particulars have been supplied as to the details of this charge and it would seem that they were not essential for the purpose of the Registrar's decision.

The ground of appeal is that as the statutory charge created by the Sanitary Boards Enactment, 1929, is subject to the provisions of the Land Code, any order for sale should have been subject to the voluntary charge and not free from that charge.

The facts are not in dispute. The lands in question are within the limits of the Sanitary Board of Kuala Lumpur and are liable to assessment under the Sanitary Boards Enactment, 1929. Assessments have been made and there are now arrears in respect of such assessments amounting to \$4,674.

No question has been raised as to the assessment or as to notice having been given. There is no information as to what, if any, steps have been previously taken to recover these arrears. No objection has, however, been taken in respect of any of these matters.

The arrears not having been paid, an application was made under section 50 of the Sanitary Boards Enactment to the Registrar of the Supreme Court, Kuala Lumpur, to order the attachment and sale of the holding in respect of which the arrears had accrued. On that application the same objection was taken that is now the ground of appeal.

The Registrar rejected the objection and made the order that the lands should be sold free from the (voluntary) charge thereon. The powers of the Sanitary Board as to rating are contained in Part IV of the Sanitary Boards Enactment, 1929. Section 45 provides, "Subject to the provisions of the Land Code, 1926, the rate shall be a first charge on the holding in respect of which it is assessed, and if not paid within the prescribed time shall be recoverable in the manner hereinafter provided."

It is noticeable that the Enactment in section 115 (dealing with contributions to the cost of constructing a street), and in section 117 (dealing with contribution to cost of constructing a drainage system), provides that "any contribution duly imposed under this section shall be deemed to be a rate and may be recovered in the manner provided by this Enactment for the recovery of unpaid rates."

In section 128 (apportionment of betterment), it is provided that "every sum under this section shall be recoverable in the same manner and by the same process as a rate."

In section 119 (interference with drains), it is provided that "if such order be not complied with the Court may authorise the Chairman to carry out the order and to recover the expenses thereby incurred from the said owner."

In section 134 (means of access to back lanes), it is provided that "if any owner fails to provide the same within a reasonable time the Chairman may enter upon such holding and do

whatever is necessary to provide the same, and the owner shall pay to the Chairman the cost and expenses thereof."

So in the same Enactment the recovery of various sums of money is provided for in different ways. Only rates are declared to be a first charge on the holding. Seemingly contributions under section 115 and section 117 are also first charges in that they "are deemed to be rates." A decision of this question is not, however, necessary for this judgment. Under section 128, sums may be recovered in the same manner and by the same process as a rate. These sums are not deemed to be a rate and therefore would not seem to be a first charge. And under section 119 expenses are recoverable but no specific means for their recovery is provided. They are not deemed to be a rate and therefore also would not seem to be a first charge. These distinctions are of importance in arriving at the intention of the Legislature in declaring that the rates should be a first charge on the holding.

A holding is defined in section 2 of the Sanitary Boards Enactment as any land with or without building thereon which is held under a separate document of title.

The statutory charge is imposed on the holding itself. But its enforcement is delayed. In sections 46 and 47 of the Sanitary Boards Enactment provision is made for the proceedings to be taken in default. These are permissive. The Chairman may issue a warrant of attachment and may seize moveable property. Such property shall be sold (section 48). The Chairman may refrain from seizing certain property found on a holding (section 2, Sanitary Boards Enactment (Amendment) 1933).

These may be termed proceedings by way of distress. They must seemingly be had recourse to in the first instance, since section 50 says, "if the arrear cannot be recovered in the manner aforesaid." But throughout, whatever steps are or are not taken, the rate is a statutory first charge under section 45.

It is, however, subject to the provisions of the Land Code. The effect of these words would be to incorporate the Land Code with the Sanitary Boards Enactment.

It has been argued that any legal interpretation put on any words by the Court should be adopted (see *Maxwell* 7th Edition p. 265) and reference has been made to the case of *Murugappa Chetty v. The Official Administrator as administrator of the Estate of Yap Chok, deceased*, (1931-1932) F.M.S.L.R. 305.

That case dealt with section 35 of the Probate and Administration Enactment, which provides that "the Official Administrator shall have a lien upon all such property for the reasonable expenses incurred by him in respect thereof in carrying out the provisions of this Enactment and for the commission, or sum in lieu of commission, payable under section 34, and such expenses and commission or sum, shall also constitute a first charge on the estate of the deceased."

It was held that under that language the lien only attached to the surplus and did not take precedence or priority over charges registered under the Land Code.

That case is distinguishable from the matter at present under consideration, since the charge or lien therein given was on the estate of the deceased and not on the holding itself. But it would seem that if it had been on the holding itself there would have been no question that it would have taken priority over the registered charges.

Now turning to the Land Code, it is noticeable that in the interpretation clause there are definitions of "Chargor" and "Chargee" but none of "Charge."

The first reference to a charge is in section 28 which provides that "rent shall be a first charge on such land and in respect of any year shall fall due on the first of January in each year." That is a Statutory or compulsory charge. It does not comply with the requirements relating to voluntary charges. These requirements are set out in Part X.

Section 129 of the Land Code provides "that whenever any land is intended to be charged or made security in favour of any person, the proprietor and the chargee shall execute a memorandum of charge in one of the forms in Schedule XXIV, which memorandum shall for description of the land refer to the register document of title therefor, and the proprietor or the chargee shall present the same together with the issue document of title." Needless to say that it would not be possible for a Statutory Charge to comply with such requirements.

There are special provisions for the recovery of the Statutory charge of rent in Part XVIII of the Land Code (Amendment) Enactment, 1933. And similarly special provision has been made in respect of the Statutory Charge in respect of rates in section 50 of the Sanitary Boards Enactment.

These provisions must not be confused with the provisions contained in Part X of the Land Code.

Under section 154 of the Land Code, a scheme of ranking has been provided. That is of course where there has been a sale of lands charged voluntarily at the instance of a voluntary chargee. Even in such a case the payment of any rent or fees to the State comes first. Next costs are paid. Next the first charge affecting the said land. Then subsequent charges. The language used in section 146 might be compared. There is no definition of the words "first charge." It is not clear whether they refer to a first Statutory Charge or a first voluntary charge. If they refer to a first statutory charge then *cadit quaestio*. If, however, they refer to a first voluntary charge, then it simply means that on a sale by a voluntary chargee, no provision has been made for the payment of a first statutory charge, other than rent, unless in some way payment could be obtained under the final words of the section which are, "It shall be the duty of the chargees and all other parties claiming to rank upon the said sum to deposit with the Court a note of their claim and the document in support thereof"; or unless instead of being treated as a first charge the statutory charge should be given a place amongst subsequent charges.

But whatever may be the position of a statutory charge when a sale has been effected on behalf of a voluntary chargee, I am satisfied that the provisions of Part X only apply in respect of sale under that part. They do not affect a sale which takes place or is ordered to take place under the statutory provisions relating to a statutory prior charge.

I have gone into the matter somewhat at length because the point taken is novel and seeks to effect a change in a long established practice.

I conclude that it was the intention of the Legislature that a rate should be protected by a first charge on the land itself and that in the last recourse it should be recovered by a sale of the land; that the words "subject to the provisions of the Land Code" do not make that first charge subject to any other charges created under Part X of the Land Code.

Therefore I find that the decision of the Registrar, Kuala Lumpur is correct. This appeal must accordingly be dismissed with costs.

Appeal dismissed.